IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.259 OF 1997

Nova Pack Private Limited,
F-28, MIDC area, Murbad,
District Thane. Petitioner

versus

1. Commissioner of Customs,
Mumbai.

2. Union of India,
through Ministry of Finance,
Department of Revenue, Central
Board of Excise and Customs,
New Delhi.

3. Central Warehousing Corpn.
Baldota Bhavan, M.Karve Road,
Mumbai 400 020. Respondents

Mr.A.M.Sethana i/by H.R.Shetty & Co. for petitioner.

Mrs.S.V.Bharucha for respondents 1 and 2.

Ms.S.I.Shah for respondent no.3.

CORAM : DR.S.RADHAKRISHNAN AND
S.C.DHARMADHIKARI, JJ.

DATE : 30th September 2005

ORAL JUDGEMENT (PER : S.C.DHARMADHIKARI, J.) :-

1. By this Writ Petition under Article 226 of Constitution of India the petitioner seeks a Writ of Mandamus ordering and directing respondent no.3 to forthwith release and deliver to the petitioner two consignments of Synthetic Yarn

Waste and ordering and directing respondents 1 and 2 to forthwith pay to respondent no.3 Warehouse charges in respect of the goods.

2. This was the prayer when this writ petition was instituted on 5th February 1997 in this Court.

3. After the petition was filed it was placed before a Division Bench for admission on 24th February 1997. This Court after hearing learned counsel appearing for petitioner as well as respondents, passed following order :-

> " Heard the learned Counsel for the parties.
>
> 2. By order dated 23rd December, 1996 issued by the Central Government to the General Manager, Central Warehousing Corporation, New Delhi, Respondent No.3 is directed to release the goods and that the Commissioner of Customs, Mumbai, was directed to make payment of rental amount for the period from October, 1993 to March, 1995. Further, the Assistant Commissioner of Customs, Appraising Group III, has, by letter dated 10th January 1997 (Exhibit "G" to the Petition), informed Respondent No.3 that the Customs will make payment of Rs.5,58,977/- to Central Warehousing Corporation. Hence, since the Customs is making payment for warehousing in terms of the order passed by the Government of India, Respondent No.3 is directed to release the Petitioner’s goods immediately on execution of bond by the Petitioner to pay any amount if Central Government so

directs. Further, if Respondent No.e is having any other claim for the warehousing charges, it would be open to Respondent No.3 to claim it from Respondent Nos.1 and 2 and for that also the Petitioners would pay the demurrage charges if the Central Government so directs."

4. A clarification was issued on 18th March 1997 by the Division Bench to the effect that execution of bond by the petitioner would be subject to result of the petition. It appears that when the petition was adjourned for further hearing, subsequent events were permitted to be placed on record and the petition was thus amended.

5. Thereafter, this Court considered the grievance of the petitioner for refund of Customs Duty on the goods which were not delivered to the petitioner pursuant to the orders of Central Government as well as of this Court. It appears that the delivery made on 16th April 1997 and 19th April 1997 was not complete. It appears that the total quantity of the goods imported was 68,915 kilograms. As against this, quantity delivered to the petitioner is 35,450 kilograms. The undelivered goods are 33,465 Kilograms. The contention of the petitioner was that insofar as these goods are concerned, the same being not

delivered, the duty liability in that behalf is wholly illegal and without jurisdiction. Hence, to the extent of undelivered goods, the duty amount ought to be refunded to them. Taking cognizance of this grievance, directions were issued to consider the application for refund made by the petitioner.

6. When this application was considered initially an order passed by the authorities was found to be totally unsustainable by this Court. Noting the rival contentions, this Court passed the following order on 18th August 1997 :-

> " Heard the learned Counsel for Respondent No.1.
>
> 2. It appears that the stand taken by the Customs Department is thoroughly misconceived. The Petitioner's application for refund of Customs Duty on the goods, of which there is pilferage at the Central Warehousing Corporation's warehouse, is rejected on the ground that it was not maintainable under Section 27 of the Customs Act. There is specific provision in Section 23 of the Customs Act for refund of Customs Duty in such an event. Instead of applying mind, the concerned officer has straightaway rejected the said application. Admittedly, in this case, at the time of clearance of the goods, the Petitioner found that there was shortage of goods at the warehouse. The pilferage was to the extent of about half of the goods.
>
> 3. Therefore, the appropriate officer of the Customs Department is directed to

> decide afresh the application of the Petitioner under Section 23(1) of the Customs Act and pass appropriate order for refund or remission of the Custom Duty paid on such goods on or before 17th September, 1997.
>
> 4. Stand over to 18th September 1997."

7. After the refund application was considered, the respondents 1 and 2 passed an order on 12th September 1997 and the claim for refund was granted. Thereafter, this Court admitted this petition on 7th October 1997.

8. Prior to the admission of this Writ Petition, on 13th May 1997, this writ petition was amended and the petitioner seeks following reliefs :-

> (aa) that this Hon'ble Court do issue a Writ of Mandamus under the said Article 226 ordering and directing :
>
> > (i) the Respondents jointly and severally to pay to the Petitioners the market value of the said 33,465 kgs. being Rs.6,85,613/- with interest at such rate as this Hon'ble Court may deem fit.
> >
> > (ii) Respondent No.1 to remit and pay back to the Petitioners the duty on the said 33,465 kgs. and
> >
> > (iii) Respondent No.3 to refrain and forbear from demanding and/or recovering warehousing charges from the Petitioners."

It is this relief which is now surviving for consideration in this petition.

9. For appreciating the rival contentions on this issue, a reference to some facts is necessary. The petitioner imported 68,915 kgs. of Yarn in India vide Bill of Entry dated 21st October 1993. On arrival of the goods, the Mumbai Customs wrongly held the import to be illegal, seized the goods and warehoused the same with the Central Warehousing Corporation (hereinafter referred to as "CWC" for short). After receipt of the Show Cause Notice, finally, the Customs passed adjudication order dated 8th March 1995 inter alia, dropping the Show Cause Notice and holding the said import to be legal and valid. Accordingly the petitioners prayed for release of the said goods. The CWC, however, refused to release them until they were paid their warehousing charges. Customs refused to pay the warehousing charges. As the petitioner’s goods were not released he had to prefer a Writ petition and finally the order of the Central Government directed Customs to pay the warehousing charges. Even this result took 3 years of litigation for the petitioners. However, goods legally imported in 1993, were not

released in 1996, despite the above order, as, now Customs refused to remit the duty in respect of the goods, short-delivered. Again the petitioner herein, was compelled to file a Writ petition and again by an order dated 18th August 1997 of the Division Bench, the Customs were directed to remit the duty paid by the petitioners herein and refund that amount. The petitioner's contention is that the goods illegally seized in 1993, have not yet been released as the respondents are now refusing to compensate the petitioner for the value of the goods short delivered to the petitioner.

10. These factual aspects are noted as above by the Division Bench. The claim now made is that the respondents must compensate the petitioner to the extent of the goods short delivered and such compensation ought to be the market rate of the same is the precise submission.

11. Mr.Sethana - learned counsel for the petitioner submits that the petitioner at the time of importing the goods had paid import duty of Rs.6,48,461/- on the assessable value of the goods, which weighed 68,915 kilograms. These were placed in 353 cartons. However, now that it

is not disputed that delivery was given to the extent of 35,450 kilograms, then the petitioner is entitled to be reimbursed with the market value of pilfered goods weighing 33,465 kilograms. He submits that the petitioner is not in any manner responsible for the loss of goods. The respondents are not accusing the petitioner of playing any role in the pilferage of the goods. The same were lost during their custody with the CWC (respondent no.3.). He submits that the said Corporation is in possession as bailee of the said goods. The failure of CWC to return the entire quantity of the goods which were duly received and so acknowledged, is enough to fix the liability and responsibility of reimbursement on them.

12. In support of these contentions, Mr.Sethana relies upon Sections 160 and 161 of the Contract Act. He also relies upon the decision of Supreme Court reported in 1999(113)-ELT-3 (SC) (Northern Plastics Ltd. Vs. Collector of Customs and Central Excise). He also places reliance upon a decision of Supreme Court reported in 2002(140)-ELT-3 (SC) (Shilps Impex Vs. Union of India).

13. He submits that in the light of the aforesaid decisions, petitioner is legally entitled to receive the goods or monetary equivalent in terms of price thereof from the respondents. The claim is restricted to the extent of pilfered goods. Mr.Sethna submits that although market value is claimed by the petitioner, the instructions from the petitioner are to restrict the claim to the C.I.F. value of the pilfered goods. Mr.Sethana submits that the petitioner is deprived of the goods/property since 1997. The action of the respondents is violative of mandate of Articles 14, 19(1)(g) and 300A of the Constitution of India. He, therefore, submits that the amended prayer may also be granted.

14. Mrs.Bharucha appearing for respondents 1 and 2 and Ms.Shah appearing for the third respondent submit that the amended prayer cannot be granted in writ jurisdiction. They submit that there is a factual dispute which needs to be resolved and the same is not permissible in writ jurisdiction. They submit that respondents are not admitting their liability to pay the market value/CIF value of the pilfered goods. On the other hand, they submit that the goods were received on

"said-to-contain" and "said to weigh" basis. They contend that number of cartons were counted, however, weight was not recorded at the time of deposit of the goods. It is contended that representative of the Clearing Agent, M/s.Shivkumar Gupta, has given a letter at the time of deposit of the cargo, that the cargo is in damaged and broken condition and could not be stacked properly. On the other hand, it is kept in haphazard manner and that clearing housing agent will be responsible for any shortage at the time of delivery. They place heavy reliance upon a letter dated 19th November 1993 issued by the representative of the Clearing Agent. They rely upon provisions of Customs Act and contend that warehouse charges on the goods have to be paid and the grievance by the petitioner in that behalf has not been accepted.

15. Mrs.Bharucha contends that the Customs Department are not liable to pay the market value of the pilfered goods because they are not the custodian thereof. It is the Warehouse Keeper who is responsible to keep the goods. Mrs.Bharucha and Ms.Shah invite our attention to the affidavits placed on record and contend that there is a serious dispute insofar as this claim

is concerned. They submit that the remedy of the petitioner to recover the market value is else where and not the present petition.

16. With the assistance of the learned counsel appearing for the parties we have perused the writ petition and the annexures thereto. We have also perused the affidavits filed in reply and rejoinder. We have also perused the written submissions filed by the petitioner.

17. The submission of Mr.Sethana is that the authorities are merely blaming each other and either of them should be directed by this Court to pay the CIF value of the goods, as claimed. The Customs Act insofar as the levy of and exemption from Customs Duty in Chapter-V thereof provides for duty on pilfered goods. It also takes care of the contingency of remission of duty on lost, destroyed or abandoned goods. Section 23 providing for the same reads thus :-

> "23. REMISSION OF DUTY ON LOST, DESTROYED OR ABANDONED GOODS :-
>
> (1) Without prejudice to the provisions of section 13, where it is shown to the satisfaction of the Assistant Commissioner of Customs or Deputy Commissioner of Customs that any imported goods have been lost otherwise than as a

> result of pilferage or destroyed, at any time before clearance for home consumption, the Assistant Commissioner of Customs or Deputy Commissioner of Customs shall remit the duty on such goods.
>
> (2) The owner of any imported goods may, at any time before an order for clearance of goods for home consumption under section 47 or an order for permitting the deposit of goods in a warehouse under section 60 has been made, relinquish his title to the goods and thereupon he shall not be liable to pay the duty thereon."

18. Section 27 provides for claim for refund of duty. The claim for payment of compensation on the pilfered goods is not on the basis of provisions of the Customs Act, 1962 but under General Law and more particularly Law of Contract. The Department is accused of wrongful acts on account of which the petitioner has allegedly suffered loss. The claim for payment of market value or at least CIF value of the pilfered goods, cannot be entertained in writ jurisdiction as, in our view, several factual aspects need to be gone into before fixing the responsibility. These factual aspects arise from denial of liability by both respondents. This is not a case where the liability is admitted during the course of earlier hearing or while the petitioner’s application for refund of duty had been considered. Mr.Sethana is not right in

submitting that earlier directions and orders of this Court amply demonstrate and prove the fact that the goods have been pilfered while in custody of CWC and, therefore, the CWC at least should be directed to make the payment.

19. In our view, at the stage of admission of this writ petition the petitioner was being called upon to make payment of duty on goods which were not delivered to him. Although, the Bill of Entry referred to the cargo and the quantity, the entire lot was not delivered to the petitioner. In this view of the matter, this Court directed that the duty liability of the petitioner be ascertained and determined proportionately. In other words, petitioner must not be held liable to pay the duty on the pilfered goods, if the law does not allow any recovery nor contemplate such payment. It is in this light that the authorities examined the refund application and allowed it. The duty amount has already been refunded to the petitioner. From these acts, the relief now claimed cannot be granted. Two different aspects of the matter namely, liability to pay duty on pilfered goods and payment of compensation for loss thereof, cannot be clubbed and considered

together.

20. For loss on account of pilferage, in our view, writ petition is not the proper remedy. There is much substance in the contentions of Mrs.Bharucha and Ms.Shah. Several aspects of the matter need to be gone into and the claim will have to be proved by leading evidence. To give an illustration, as to whether the representative of the Custom House Agent of the petitioner was authorised to give any writing of the nature executed on 19th November 1993, is something which cannot be gone into in writ jurisdiction. The assertion of the petitioner that the representative had no authority to sign such letter and this aspect becomes clear if the communication from the Custom House Agent is perused, cannot be gone into and adjudicated upon in the limited jurisdiction conferred upon this Court under Article 226 of the Constitution of India. The claim will have to be proved in accordance with the law for which, if necessary, the Custom House Agent as well as his representative will have to be summoned by the petitioner. Similarly, documents and records from the custody of the Customs Department and CWC, will also need be summoned and produced and

their contents proved in accordance with law. Such being the facts and circumstances, we cannot accept the contentions of Mr.Sethna. We decline to entertain this claim despite strenuous and persuasive pleas of Mr.Sethna.

21. Reliance placed on the decision in Northern Plastics Ltd. by Mr.Sethna is not apposite. There, the Supreme Court was exercising jurisdiction under Article 142 of the Constitution of India R/W Order 47, Rule 6 of the Supreme Court Rules, 1966. There the claim arose on account of confiscation of the goods. The order of confiscation was held to be bad and declared illegal by the Supreme Court on the ground that there was no mis-declaration of the goods. It was held that the applicant was entitled to import the goods on the open general licence. The applicant could have claimed for the damage to the goods and the loss caused to them as a result of illegal retention of the same. In the light of these admitted facts and further the respondent before the Supreme Court in the counter affidavit not disputing the liability to return the money value of the goods and an order being passed in that behalf, that, ultimately, the Supreme Court directed payment of

the value of the goods prevailing at the time of their clearance.

22. The fact situation is not identical. We have no powers like Article 142 and therefore, this judgement cannot be of any assistance.

23. The order in Shilps Impex of the Supreme Court does not lay down any principle of law which could be applied to a case of the present nature.

24. On the other hand, it appears to us that the liability arising out of a contract of warehousing with the warehouse keeper, would have to be adjudicated and decided upon in the light of the contractual stipulations and the provisions of Contract Act. Similarly, the claim for loss of pilfered goods and reimbursement at market value, would have to be scrutinised and adjudicated upon in the light of the provisions contained in General Law. This is not a case of statutory liability and obligation which could be enforced in writ jurisdiction. The claim of loss and damages would have to be adjudicated by the normal remedy i.e. a Civil Suit or Arbitration.

25. For the aforesaid reasons, we decline to pass any orders on the amended prayer clause (aa) of this writ petition. The unamended petition has already worked itself out in the light of the orders reproduced by us hereinabove and nothing further survives for adjudication in that behalf. Consequently, leaving other remedies open to the petitioner for claiming relief in terms of prayer clause (aa), we dispose of the present writ petition. However, there shall be no order as to costs.

(DR.S.RADHAKRISHNAN, J.)

(S.C.DHARMADHIKARI, J.)